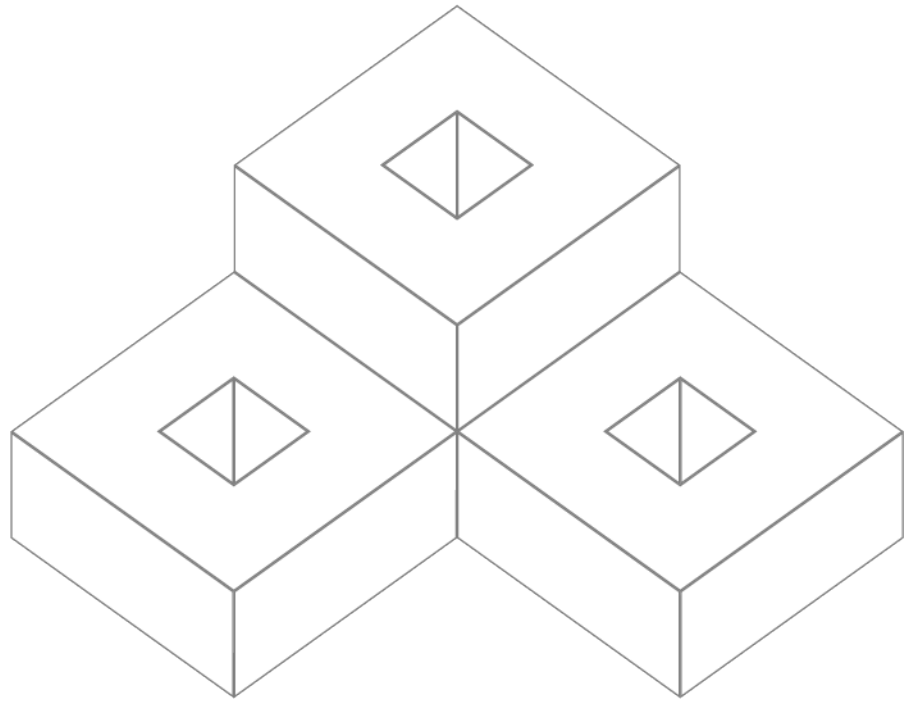
INTERNATIONAL REVIEW

Issue 2
June 2019



# IPRA CINDER

## THE PRIVATIZATION OF THE REGISTRIES



# IPRA CINDER

## INTERNATIONAL REVIEW

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INTERNATIONAL PROPERTY REGISTRIES ASSOCIATION


IRIB
Instituto de Registro
Imobiliário do Brasil

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We are pleased to present the second issue of the IPRA-CINDER International Revue, following the first issue which addressed the question of applying modern blockchain techniques in property registration.

In this issue we examine the problem of the institutional organization of registries. By this we mean the legislative policy option of whether to place the operation of registries in the public sphere or the private sector, not overlooking the possibility of solutions that lie somewhere between the two extremes.

These subjects were discussed and mulled over at the association's last congress, in Cartagena de Indias, Colombia. Our magazine features the contributions of a number of excellent specialists.

Kye Tran-Tsai, special counsel at Nolan Lawyers (Sydney, Australia), has examined the case of the New South Wales land title registry, which has been leased to a private consortium for 35 years. Ms. Tran-Tsai thanks Professor Peter Butt of the University of Sydney for his comments on her draft paper.

Alasdair Lewis, in his capacity as former Director of Legal Services at Her Majesty's Land Registry for England and Wales, has a fine grasp of the subject, as has been proven over the years in IPRA-CINDER activities. He offers his thoughts on the issues to consider when privatizing a land registry.

Jeffrey W. Lem, B.Comm, J.D., LL.M., Director of Titles for the Province of Ontario, Canada, shares his personal views on debunking myths surrounding the privatization of land registries. What he has to say is particularly interesting because it affords a perspective that is both theoretical and practical.

Lastly, Peter Sparkes, professor of Property Law at University of Southampton, brings up the dilemma of Her Majesty's Land Registry: public or private? He offers us a first-hand view of the British debate on this initiative.

Our Book Review brings us Benjamin Verheye's review of L.M. Martínez Velencoso, S. Bailey and A. Pradi's Transfer of Immovables in European Private Law in The Common Core of European Private Law.

I'd like to thank all those who make our Revue possible, most especially the members of the Editorial Board, Sergio Jacomino, tireless scholar of property registration law, the Instituto de Registro Imobiliário do Brasil, the Universidade do Registro de Imóveis, Professor Bruno Rodriguez Rosado, and Eli Sumida (Brazil).

They and all our contributors make this wonderful exchange of ideas from around the world possible.

**Alfonso Candau**
General Secretary

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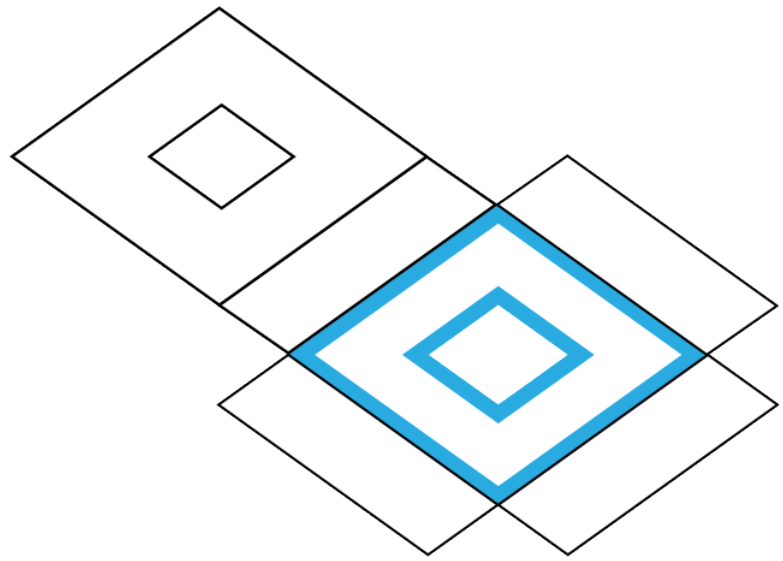

# Privatization and land registration: the state of play

**Nicolás Nogueroles**
Land Registrar
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## I. LAND REGISTRATION AND PRIVATIZATION: A "CONTRADICTIO IN TERMINIS"

Land Registration is a public solution to the problem of who the owner of a property is and how to acquire a property right that eliminates fear of eviction. The public authority, that is the State, takes into account the transfer of property and, more importantly, the production of property rights, real rights or "rights in rem" in order to grant an absolute title instead of a relative title. This is not only a "better title" but "*the* title", universally valid and exclusive.

The new logic in land registration determines that the title is not entrusted to private citizens, but rather to a public institution (either a bureaucratic institution or court). Title is not what parties have done but the effect of registration (title by registration).

It is essential to understand that land registration is related to the transfer and creation of property rights (a new method of Land Transfer according to Brickdale and Harvey). This should be stressed because in some reports from multilateral institutions, land registration is encouraged in order to levy taxes on property. This gives a different perspective on the connection between land registration and privatization.

Land registration was the way to overcome the inefficiencies of private conveyancing, which was characteristic of England in the 19th century, paving the path for registered conveyancing. Richard Cobden, a free trade land promoter, recognized that the function should be carried out by the State because private individuals were unable to guarantee the

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[1]There are several questions which must be addressed by a Land Registration system:
1- What happens when a transaction is void according to the relevant legislation? For example, when the contract or the title, according to the legal system from which the seller derived his right, was invalid?
2- How should a valid transfer be dealt with when the seller lacks the power to dispose of it because he/she is not the owner?
3- What happens when a previous transfer, a link in the chain of transactions, is declared void?
4- How could hidden charges or overriding interests affect the person who has registered his right or recorded his contract?
5- Who will be protected if a seller has sold the same property to different buyers (a double sale)?
6- Could the registered purchaser be evicted if someone has a prior right or interest in the plot of land?

creation of an absolute title—something that always requires an authoritative declaration. The same can be found in civil law countries where the entry in a Land Registry is seen as a public declaration of conclusiveness performed by a public power addressed to all citizens (Luigi Mengoni). The Land Registry not only confers title but creates a proof or evidence that binds the courts (creates an undisputed title according to civil law jurisdictions) and has some presumptions of accuracy and, in some systems, a declaration of indefeasibility. Private and public law cross paths in the Land Registry.

Privatization of Land Registries always requires an explanation of what is going to be privatized. In other words, there are degrees of privatization. But conferring a title, which means creating an absolute right, producing evidence by which a court is bound and granting indefeasibility, can only be carried out by a public power. In this sense, Land Registration is contradictory with privatization because Land Registration is the public solution—or intervention—in the process of transferring and creating property rights. The same is true with the supposed privatization of justice—such an action would be an involution. State building is linked to having a monopoly of justice and land registration. But there are aspects of the land registration process which can be outsourced or entrusted to private entities selected to manage the Land Registration system and how its actions will be carried out.

## II. WHAT CAN BE PRIVATIZED? ORGANIZATION AND MANAGEMENT PROBLEMS

### Introduction

Land Registration as a function, a quasi-judicial function in some jurisdictions, is never totally privatized. It is a public solution to the problem of contracting so privatization is the opposite. If this function loses its public attributes (creation of public evidences, indefeasibility, presumptions of accuracy, procedural proofs, priority) it will be something different but not Land Registration. It will be transformed into a mere archiving function but without the public effectiveness. These effects admit several degrees that reflect the involvement of the State in the process of creating property rights. There is no competition in the field of registration because it is a monopoly and it is regulated everywhere. However, what can be privatized is the management of the system and

the process of registration. The function itself must remain public. The proof of this is that there is always a discussion about what should be retained by the State and in every privatization, the "State guarantee" is preserved. Thus, privatization is reduced to an organizational problem of the system.

Examples have recently shown that privatization or outsourcing can be limited to certain aspects such as access to information from the Land Registry or to the registration procedure itself. The information may be sold by a third party (there are some examples in the international field even inside the public administration where another public body is in charge of sales of information derived from the Land Registry) but the issue of building trust in the declarations from the Land Registry is still a public issue. It is not possible without a State guarantee or the intervention of a public institution to give title or to confer indefeasibility.  Nonetheless, the registration process can be managed by a private company. In all cases, it is not possible to give a general answer because the solution depends on the Public Law (Administrative Law) in each jurisdiction. To decide what must be public and what can be privatized depends on the nature of the problem that needs to be solved.

The key question here is whether legislation at the national, federal or regional level allows for "an authoritative function" to be outsourced or delegated to a non-civil servant or non-public authority. In other words, must the core functions of the Land Registry be delivered by civil servants? There is a need to clarify legally and functionally: what are the functions that must be retained by government? If Land Registration is considered a public function (performed by the public powers at a regional, federal or national level), what is the minimum needed to be considered a public function? What is the core function of Land Registration that must be retained by the Public sector that cannot be outsourced because it is linked to the idea of sovereignty? Land Registration will not be a public function if this core is outsourced.

## Model options

There is no specific model for carrying out privatization. The multi-national experiences described in the articles contained in this issue offer good examples as they examine a wide variety of situations. The information here is enriched by to the gamut of answers and possibilities coming from the specific administrative law from each jurisdiction.

We can generally sum up the models as follows:

**1.** A concession given by the public administration to a private company for a period of years, after which service is expected to revert back to the public sector. It operates as a lease. This concession depends on the nature of Land Registration, as everything linked to authority is excluded from concession in some jurisdictions.

**2.** A contract between the Government and a private operator. Under this model, the Registers remain with the Government but the right to use the information, the employees and assets are transferred to the private sector under a long-term contract. The contract establishes standards for the service, the transfer of risk and whether or not the core statutory functions are transferred.

**3.** A new company co-owned by the Government and the private sector which provides Land Registration services. It can be a joint venture. The Government retains ownership of the Land Registry while the private company brings capital, know-how and technology. The private company manages the service under the control of the Government.

**4.** A Government-owned company, which takes advantage of freedoms in the private sector for hiring employees or contracting suppliers. It is not strictly a privatization, but a means for avoiding some regulations in the public sector.

### Advantages

The following reasons for efficiency and public benefit are given in favour of privatization:

**1.** Higher revenues are generated, usually soon after the contract is signed. Resources can be used to reduce public debt, invest in infrastructure or fund education and other public goods, benefiting not only the Land Registration System but other Public institutions.

**2.** Private sector standards are applied to the public sector, resulting in greater efficiency and organizational flexibility, as it is not subject to administrative law. Most importantly, employees are not civil servants, so workers fall under the jurisdiction of ordinary labor laws. In many jurisdictions, this brings more flexibility to the work force, particularly in a moment where the introduction of new technologies will transform the way registration is carried out and may even make some jobs redundant.

**3.** Organization of the offices using market criteria and offering wage incentives like in many private companies. This helps not only to attract but also to retain talent in the sphere of these organizations that perform independent controls. Incentives not only improve performance but also bring new technology to the system. It is a means for eliminating self-satisfaction.

**4.** Risk is transferred from public administration to the private sector, which can be decisive in the case of a slump in the housing market (A. Lewis)

## Challenges

Privatization of Land Registry management raises some questions and fears, and solutions for the challenges that arise will be specific to each country. Each region's specialists will deal with issues from their national or regional perspectives. It is important to observe what has happened in practice in jurisdictions where privatization has been carried out, because errors in the system can take a long time to be perceived and recuperation can therefore be difficult. For this reason, much comparative analysis is needed. The articles in this issue address these worries, some citing experiences of privatization. Some worries are considered only a myth. (Lem).

Some of the challenges that arise with privatization are:

**1.** Data ownership. Government and its citizens should retain ownership, and the main issue is the use to which the data is put. More so, determining rights for use by the private company is crucial.

**2.** The loss of expertise on the Government side. This can be a problem for two reasons: first, maintaining the ability to control the private company's performance in carrying out registration. Second, loss of expertise by the Government can difficult recovery of the function even though it is temporarily performed by private interest.

**3.** Who will invest and how investments will be controlled in the system. A transparent system must be established in order to see how much money is invested in improving the system and what new advantages investments bring. Are privatization contracts transparent and accessible to the public?

**4.** There is a risk that privatization could lead to a one-off payment leading a loss of future revenues.

**5.** Governments can become captive to a corporation, due not only to the loss of expertise (see number 2 above) but also to long-term contracts. Land Registration is always a monopoly.

**6.** Privatization can lead to increased fees.

**7.** The risk of insolvency. What happens if the company makes no profit? How is the rate of return set? The service of Land Registration cannot be stopped or suspended because it is an essential artery for national economies.

**8.** The risk of ownership of the operating system and the software licenses. If the operating system belongs to a private company (see 2 and 5 above) the possibility of captivity of the regulator increases. Ownership of the data is a secondary issue because what is relevant is use of the data through the operating system itself, and the ability to operate the system.

**9.** The aim of the system seems not to be determined by public interest (Common Good, Gemeinwohl, l'intérêt général) but by what generates the most profit.

**10.** The Land Registry is an institution that performs a control ex ante to the deeds. How can a private institution, which has invested a huge amount of money, perform impartial control over the person or institution that is going to pay the fees needed to recover its investment? Is it possible for a private company to carry out impartial control?

**11.** Who is going to be liable for registration errors? All privatization procedures are linked to risk management.

Some cases have already occurred and can be analyzed (fee increases, number 6) while others are hypothetical cases (insolvency, number 7). Many of the challenges of privatizing the Land Registry are quite similar to problems that have arisen in other privatizations.

## III. THE ORIGIN OF THE PRIVATIZATION PROBLEM

It is important to point out that the debate on privatization originated in Anglo-Saxon nations. The jurisdictions where privatizations have been carried out are title systems. Meanwhile, in civil law countries, this problem was solved in the 19th century when public institutions were built at times linked to the courts and at times to Justice Departments or Ministries.

The use of new technologies, the need to change from a paper-based system to a digital environment involves great financial investment. The need to adapt running registration systems has been a catalyst for privatization. In recent decades, digital services have transformed society and privatization is one of the ways to face this problem in the field of Land Registration.

There are three main drivers for privatization of Land Registry systems: Title systems, data producers and the need for new revenue sources.

The first case arose in the 1970 ś when it became necessary to introduce computers to registration offices' daily processes. The Ontario Law Commission's recommendation was to move forward to a title system.

Secondly, information has always been a key element for economic development (Akerlof, Stigler). Land Registry plays an important role in assuring symmetry of information in a contract sale. In the era of big data, the Land Registry is a producer of rights in rem, a source of information derived from its wealth of data. Land Registry is not a mere database, but as source of data, it can be treated as a refined database.

Thirdly, Land Registries the world over have been considered a source of revenue, not only in that they add value to registered rights, but also because they can increase the public budget. There are a few States which have limited fees for the cost of service, avoiding using Registry revenues as a tax to improve other administrative budgets or subsidizing other ministries. But the cadastres were the first to perceive the potential for revenues from Land Registries and therefore promoted mergers between both institutions (Wim Lowman), and the private sector now sees Land Registry as a source of profit.

The important question stands, however, that if Land Registry offices generate enough revenue, have high level expertise and skilled staffs, why can digital adaptation not be carried out and managed by Land Registry organizations themselves? It is a myth that the private sector always performs better than the public—there areas where public excels (Paul Krugman).

There are two areas that must be taken into consideration:

**a)** Where do the Land Registries' revenues go and what percentage is dedicated to improving the system?

**b)** What are the incentives of the people working in the system?

In a self-financing institution, it is difficult to understand that an immediate cash investment is necessary, mainly coming from public institutions (in some privatization cases, the money came from the municipality's pension fund and even the company was publicly half-owned by an administration such as the province). Is there no financing alternative available on the market? There is a need to reshape the incentives and revenues from fees to cover the cost of improving the system. This leads to the need to clarify and establish a clear line between a registry fee and a tax.

From a managerial perspective, following the studies of Arruñada and Hansel, bureaucracy's greatest problem is the lack of incentives.  Creating a strong public-private collaboration involves many separate decisions. This separation of tasks paves the way to a hybrid organization. The key point is that effectiveness results from a combination of incentives and control. The Land Registry can be designed as a hybrid organization that combines high-powered incentives in some dimensions (to avoid revolving doors) and strict controls in others.

## IV. THE CIVIL LAW COUNTRIES' PERSPECTIVE.

In European Civil Law countries, Land Registration belongs to the public sector. There is no debate in favor of privatization. Land Registries were mainly created during the

19th century as a public intervention in the market. Land Registry is linked to the Rule of Law and provides a framework for the market economy. Even the latest managerial reforms in France and Belgium stress the public character of the Land Registry.

However, some organizations in Civil Law countries are very similar to what has been considered a privatization in Common Law countries. In countries such as Chile, Brazil and Spain, Land Registrars are a hybrid organization called "public functions executed by a private", or an "official profession". They are similar to a concession because the Land Registrars are subject to personal liability and are responsible for contracting employees and organizing the public service in the most efficient way. The system has even been compared to private franchising with a central unit and a network of offices. Still, they are considered to be civil servants because they are subject to the control of the Ministry of Justice or the Courts of Justice and exercise public power. Registration is an authoritative declaration that can only be made by the public power.

From the modern Public Law perspective, this type of organization is close to the idea of "neutral public power" (Sandulli) or "neutral agency", which is considered an "indirect administration" in the sense that performs public functions, its decisions have public effect, but these people are not integrated in the ordinary administration[2].

There is nevertheless an important difference between privatization in Common Law countries and these hybrid means of organizing public service in some Civil Law countries: the selection process. In the examples studied in this issue, a company is chosen after a call for tender. There are several points to take into consideration, one being the economic offering. In Civil Law countries, these civil servants are elected only by merit and capacity according to the idea of promoting equality to access.

The problem of privatization of Land Registries can be looked at within the broader perspective of a new relationship between the State and Society, as do the specialists in Public Law (Esteve). The need for new and complex knowledge available outside the administration leads to allocating new functions to the private sector, evidence of the crisis of the bureaucratic administration as retainer of knowledge. Technological

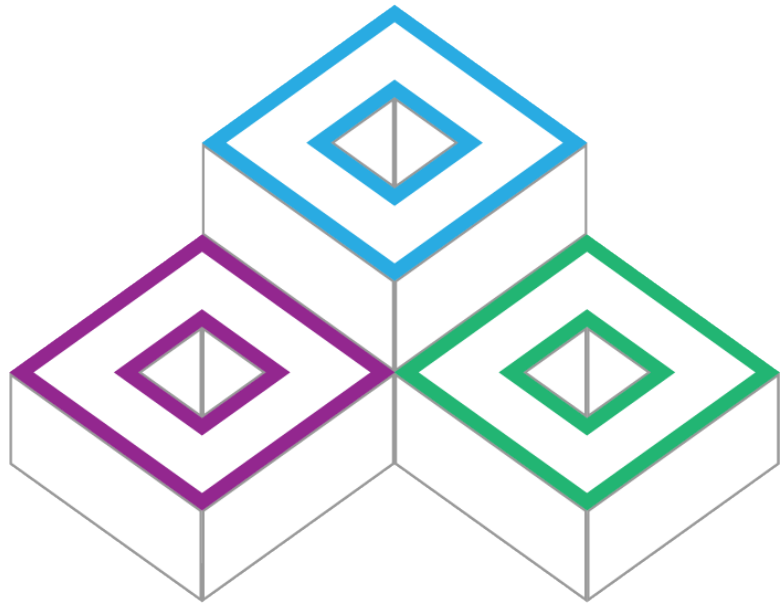
[2] Another example of privates performing public functions are the "*Beliehne*" in Germany, although not in the field of Land Registration, which is responsibility of the Courts.

evolution has been the key issue in all fields, not only Land Registration. This has led to rethinking of the functions of the State and in Germany a new idea of State as guarantor (Gewährleistungsstat) has arisen.

## V. THE PURPOSES OF THE IPRA CINDER REVIEW

The problem of privatization must be examined in broad terms, but specific details on real processes underway are also necessary. For this reason, we present articles from different jurisdictions analyzing how the system has been working, which is the case in Canada; the new cases of privatization such as New South Wales and South Australia; and a theoretical approach from England where a consultation paper about privatization was released. However, there may at times be a problem with over-specification, as pointed out by Nobel prize winner Elinor Orstrom. System designers can fall into the trap of believing that their own cases are completely different from others. It is the purpose of this issue to learn from studying multiple cases.

The design principles of Land Registration systems and how they work must be taken into account. All the processes of privatization must be closely monitored. Transparency has become a cornerstone for the process, in creating contracts and rules, in sharing information and making it possible to monitor and understand what can or cannot be done.





# New South Wales land title registry leased to private consortium for 35 years

**Kye Tran-Tsai**

Special counsel at Nolan Lawyers (Sydney, Australia). She was formerly a lawyer in the LPI. Kye would like to thank Professor Peter Butt of the University of Sydney for his comments on the draft paper.

In May 2016, the New South Wales Government controversially granted a concession of the titling and registry service of the LPI. The buyer, Australian Registry Investments Pty Ltd ('ARI'), is a private consortium consisting of Hastings Fund Management and First State Super. The consortium paid AU$ 2.6 billion for the exclusive rights concession for a 35-year term. The concession entitles the 'Operator' to run the titling and registry arm of the Registry under the oversight of a newly established Government 'Regulator'. In practical terms, the concession amounts to a lease of the government's titling and registry functions, which, up until then, had been solely operated by the New South Wales Government.

The announcement had an immediate knock-on effect. The South Australian Government has since announced a concession of its Land Title Registry for AU$ 1.6 billion for the next 40 years[1] (South Australia is the home of the Torrens system of land registration). At the time of writing, the Victorian Government is proposing to 'commercialize' certain land title and registry functions of its land title registry.[2]

The sale of government-owned business, by concession, or 'privatization', has occurred in many industries at both State and Commonwealth level in Australia over the past three decades. This, however, is the first time that land registry functions have been privatized in Australia.

## THE WINNING BIDDER – AUSTRALIAN REGISTRY INVESTMENTS

ARI won a competitive bidding process for the concession of the titling and registry functions of LPI. Their bid included a 'technology roadmap' as ARI's vision for transforming the existing titling and registry business. The Government viewed this favorably, seeing it as helping to improve LPI's technological base.[3] Not much is publicly known about the newly created Operator. Reports suggest that it is made up of 80 per cent Australian institutional investors,[4] but is said to be 100% Austra-

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[1] The Hon. Tom Koutsantonis MP, Treasurer, News Release, August 10, 2017, https://www.treasury.sa.gov.au/__data/assets/pdf_file/0016/20626/Lands-services-commercialisation-media-release.pdf

[2] The Hon. Tim Pallas MP, Treasurer, Media Release, December 4, 2017, https://www.premier.vic.gov.au/wp-content/uploads/2017/12/171204-Land-Use-Victoria-Vital-Services-To-Remain-In-Public-Hands.pdf

[3] D. Purves, 'Newly privatised NSW Lands to develop IT and data products', *Investment Magazine*, April 13, 2017 https://investmentmagazine.com.au/2017/04/newly-privatised-nsw-lands-to-develop-it-products/

[4] M. Sansom, 'NSW land titles lease sold to consortium for $2.6 billion', *Government News*, April 12, 2017 https://www.governmentnews.com.au/2017/04/land-titles-lease-sold-consortium-2-6-billion/

lian managed.[5] It seems to have been established as a special purpose company for the bid (and ultimately for the concession), having been registered as an Australian company on March 16, 2017.

The transaction was completed on June 30, 2017. ARI commenced its operations under the concession on July 1, 2017. On December 1, 2017, ARI rebranded the titling and registry service logo and business name from Land and Property Information to 'NSW Land Registry Services'.

## BACKGROUND TO THE CONCESSION

LPI was a highly regarded, state government-run business. The business carried out the day-to-day administration of land titling, and was also responsible for surveying, valuation and spatial information. Historically, the land titling and registry arm of LPI had consistently returned a profit to the state. The reliability and certainty of those combined functions supported billions of dollars' worth of steadily increasing housing activity in New South Wales each year. (Indeed, in the 2016-2017 financial year, the state's collector of duties, Revenue NSW, collected a record AU$ 29.4 billion in revenue.) [6]

### E-conveyancing

LPI had for many years led and invested in various innovative projects. A key recent one was the National Electronic Conveyancing initiative, which began in 2010. This initiative has since evolved into an online, privately owned platform allowing for electronic conveyancing ('e-conveyancing'), enabling online settlement and document lodgment to be transacted instantaneously. E-conveyancing has been heralded as signifying a new era for paperless, digital transacting. First implemented in 2013, the national e-conveyancing platform and its successive releases have been built on a legal framework with significant input from LPI alongside other Australian States and industry bodies. In February 2017, the Government announced timeframes for moving toward mandatory e-conveyancing by July 2019. Further advances in national e-conveyancing are scheduled in the immediate future. The Operator will inherit the benefits of this key initiative.

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[5] Australian Registry Investments, *Media Release*, April 12, 2017, https://www.uta.com.au/sites/default/files/Australian%20Registry%20Investments%20media%20release%20-%2012%20April%202017.pdf

[6] Department of Finance, Services and Innovation Annual Report 2016/17 https://www.finance.nsw.gov.au/sites/default/files/annual_report_dfsi_2016-17.pdf, page 22

### Organizational changes

In the lead-up to the concession, LPI underwent significant organizational change, separating the government business into five separate units:

1. Titling and Registry Services
2. Office of the Registrar General
3. Valuation Services
4. Spatial Services
5. Office of the Valuer General

Titling and Registry Services was the only business unit sold as part of the concession. All other units remain with the Government. It is now apparent that these organizational changes were made to enable the Titling and Registry Services unit to be sold, and to operate as independently as possible.

The organizational change also established the Office of the Registrar General (ORG), who would become the 'Regulator' overseeing the operation of Titling and Registry Services. The Operator and the Regulator have entered into a 'concession deed', to help the Regulator oversee the Operator's performance. The details of the deed have not been made public.

## CONCERNS REGARDING THE CONCESSION

Many concerns were raised about the sale, both before and after it occurred. The first formal announcement of the proposed sale was on May 20, 2016, by the then New South Wales Treasurer, the Hon. Gladys Berejiklian MP (later Premier of New South Wales). She announced that the New South Wales Government would open up the titling and registry operations of LPI to purchase by private business. In a media release, she said:

> *'[t]he integrity of the titling system will be protected by a strong regulatory framework. This will include Government oversight of any private operator and the continuation of the State's guarantee of the Torrens titling system backed by the Torrens Assurance Fund.'*[7]

On offer was a 35-year concession. The Government decided to offer the concession

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[7] The Hon. Gladys Berejiklian, MP, Treasurer and Minister for Industrial Relations, *Media release*, May 20, 2016, https://www.treasury.nsw.gov.au/sites/default/files/mediarelease/20160520---Media-Release---Berejiklian---LPI-transaction-to-fund-new-infrastructure.pdf

after accepting the recommendations of a confidential scoping study it commissioned, initiated in September 2015 and prepared by the leading accounting firm JP Morgan.[8]

Industry stakeholders and the New South Wales public had concerns about the Government's decision to offer a concession of its land title registry business to a private operator. Some of those concerns included:

- **The privatization itself** – There was general acceptance that LPI played a unique role in supporting the New South Wales economy and therefore, should remain in government hands. A strong critic was the Law Society of New South Wales. Its 2016 President, Mr. Gary Ulman, praised the LPI as being one of the best performing land titling services in the world and said that *'[t]he justification for the privatization of public assets usually lies in the need for a large-scale injection of capital into an industry, or to address underperformance by a government utility. Neither rationale applies in this case'*.[9]
- **Land titling and registry services being an essential service and a 'natural monoply'** – LPI operated a monopoly title registry. No other provider was allowed to offer that service. That being so, on the grant of the concession, no other market player could compete with the Operator. This raised short and long-term pricing concerns for users, who could be required to pay more because commercially-driven, private enterprises seek returns on their investment.
- **Increased costs, making conveyancing transactions more expensive** – Many Australians generally oppose privatization of essential services for fear of increased prices and reduced service. In relation to the privatization of LPI, these concerns had two main aspects. The first was the potential for steady increases of essential land title fees and products. The second was the potential watering down of the state guarantee of title, requiring purchasers to obtain their own independent title insurance, adding additional costs to transactions.[10]
- **Erosion of public confidence** – The proposed concession of LPI had an additional

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[8] The Hon. Gladys Berejiklian, MP, Treasurer and Minister for Industrial Relations, *Media release*, May 20, 2016, https://www.treasury.nsw.gov.au/sites/default/files/mediarelease/20160520---Media-Release---Berejiklian---LPI-transaction-to-fund-new-infrastructure.pdf

[9] No author attribution, 'Lawyers critical of plan to privatise land title registry', *The Real Estate Conversation*, May 24, 2016, https://www.therealestateconversation.com.au/news/2016/05/24/lawyers-critical-plan-privatise-land-title-registry/1464072645

[10] E Han, 'Personal data up for grabs in NSW land titles sale, experts warn', *Sydney Morning Herald,* January 10, 2017 and updated January 11, 2017, https://www.smh.com.au/national/nsw/personal-data-up-for-grabs-in-nsw-land-titles-sale-experts-warn-20170110-gtopxl.html

layer of controversy. LPI had a successful history of operating the Torrens Register, has always been a profitable government-owned going concern, and was led by staff who had proven to be both responsible and reliable in applying their expertise in managing the state-guaranteed Register. Concerns were raised about the continuity of expert staff to maintain the integrity of the Register, and to prevent erosion of public confidence in the Register.[11] Other concerns included cost-cutting measures, and whether jobs would move offshore to reduce operating costs.

- **Lack of transparency** – The New South Wales Government's approach to the con cession lacked transparency.[12] Official details of the concession were minimal. Many important documents referenced in public sources, including in the legislation that enabled the concession, referred to documents that were never intended for public release.[13] For example, the comprehensive scoping study commissioned by the Government, was never released. This prevented an open and transparent sale of the public assets.
- **The concession price** – The Hon. Gladys Berejiklian (now Premier) said she was 'thrilled' and that the sale 'result has significantly exceeded expectations'.[14] The leader of the Opposition, Luke Foley MP, had a different view, stating that New South Wales got a 'dud' deal because LPI could have generated AU$ 2.6 billion in profit in 20 years.[15]

No independent assessment of the concession price was released to the public — if indeed any independent assessment was ever made.

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[11] On the significance of the state's role in registration, see Isaacs and Rich JJ in *Commonwealth v New South Wales* (1918) 25 CLR 325 at 342: 'It is not the parties who effectively transfer the land, but it is the State that does so, and in certain cases more fully than the party could. In short, a transferee seeking registration of a transfer seeks State affirmance of his position.'

[12] Editorial, 'NSW government risks reputational stain over land titles registry sale', *Sydney Morning Herald*, April 5, 2017, https://www.smh.com.au/national/nsw-government-risks-reputational-stain-over-land-titles-registry-sale-20170405-gve6fs.html

[13] For example, s 13 of the *Land and Property Information NSW (Authorised Transaction) Act 2016* provides that the 'authorised concession arrangements' are to include an non-exhaustive list of transaction arrangements for the purposes of the authorised concession, but these documents have not been identified or made available for public review.

[14] The Hon. Gladys Berejiklian, MP, Premier of NSW and The Hon. Dominic Perrottet, MP, Treasurer, *Media Release*, April 12, 2017, https://www.treasury.nsw.gov.au/sites/default/files/2017-04/12042017%20-Media%20Release%20-%20Berejiklian%20and%20Perrottet%20-%20NSW%20receives%20massive%20infrastructure%20boost.pdf

Editorial, 'NSW government risks reputational stain over land titles registry sale', Sydney Morning Herald, 5 April 2017, https://www.smh.com.au/national/nsw-government-risks-reputational-stain-over-land-titles-registry-sale-20170405-gve6fs.html

[15] E Han, 'NSW land titles registry leased for $2.6 billion to Hastings Funds Management, First State Super', *Sydney Morning Herald*, April 12, 2017 and updated April 13, 2017, https://www.smh.com.au/national/nsw/nsw-land-titles-registry-leased-for-26-billion-to-hastings-funds-management-first-state-super-20170412-gvjcfw.html

- **Asset recycling** – There were both political and public objections with the Government's proposed use of the net proceeds from the concession, intended for funding new infrastructure across New South Wales. Specifically, AU$ 1 billion of the proceeds were set aside for upgrading three large sporting stadiums (although, more recently, this proposal has been scaled back).[16]
- **Data protection** – Significant concerns were expressed regarding the protection of bulk registry data in the hands of a private operator.[17]

## THE LEGISLATION

The transaction was authorized by the *Land and Property Information NSW (Authorised Transaction) Act 2016* ('the Act'). The Bill for the Act was introduced to Parliament on September 13, 2016, with the following objectives:

> *'... to provide for the transfer of the assets and staff of the Titling and Registry Services Division of Land and Property Information NSW and to provide for a concession for the operation of titling and registry services by the private sector; and for other purposes.'*

The Act also amends the *Real Property Act 1900*, being the principal legislation that establishes and governs the Torrens Register, as well as other related legislation, to allow the Operator to perform the operational functions of the Register, but under the oversight of the Registrar General.

The Bill became law on September 28, 2016. Below is a summary of some of the Act's provisions.

### The authorized transaction

The Act allows the Treasurer to authorize the transfer of the tiling and registry services to the private sector for a maximum term of 35 years.[18] The term cannot be renewed or extended beyond that period.[19] The titling and registry assets include the assets, rights

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[16] A Smith, 'Berejiklian waters down her $2.5 billion Sydney stadiums plan', *Sydney Morning Herald*, March 29, 2018, https://www.smh.com.au/politics/nsw/berejiklian-waters-down-her-2-5-billion-sydney-stadiums-plan-20180329-p4z6zx.html

[17] E Han, 'Personal data up for grabs in NSW land titles sale, experts warn', *Sydney Morning Herald,* January 10, 2017 and updated January 11, 2017 https://www.smh.com.au/national/nsw/personal-data-up-for-grabs-in-nsw-land-titles-sale-experts-warn-20170110-gtopxl.html

[18] *Land and Property Information NSW (Authorised Transaction) Act 2016*, sections 4(1)(a) and 4(2).

[19] Ibid, s 4(2).

and liabilities used, accrued or incurred in the course of exercising the titling and registry functions.[20] There is no itemized list of the assets or liabilities in the Act.

### Automatic re-vesting

There are provisions for the automatic re-vesting of the titling and registry assets to the portfolio Minister after the concession term or on early termination of the concession.[21]

### Delegation of titling and registry functions

The Act provides for the titling and registry functions to be delegated to the authorized Operator for the purposes of the concession.[22] In practical terms, this means delegation to the Operator of both operational and legal functions associated with:

- **The Torrens Register** – the complete Register of definitive legal interests in New South Wales.
- **General Registry of Deeds** – the repository for pre-Torrens system ('old system') deeds and other instruments.
- **Central Register of Restrictions** – a centralized database recording potential and actual use of land by government agencies and utilities, for the purpose of carrying out land inquiries.

### Data protection measures

The Act requires the 'authorised concession arrangements' to ensure that electronic forms of the Register are stored on dedicated physical infrastructure located in Australia[23] and that the Operator is to implement and maintain data security and fraud detection practices.[24] The information contained in the data belongs to the State and is not acquired by the Operator.[25]

Legislation governing privacy and personal information apply to the Operator as if it were a public sector agency.[26]

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[20] Ibid, s 3 (interpretation).
[21] Ibid, s 4(1)(c).
[22] Ibid, s 14(1).
[23] Ibid, s 13(2)(a).
[24] Ibid, s 13(2)(b).
[25] Ibid, s 13 (2)(d).
[26] Ibid, s 39(1).

### Liability of Operator for compensation

The Act exempts the Operator from liability to pay compensation for loss or damage arising from its acts or omissions in the course of exercise or purported exercise of titling and registry functions.[27] That liability attaches instead to the Registrar-General.[28]

### Authorized concession arrangements and penalties

The Act requires the 'authorised concession arrangements' (defined as the transaction documents for the purposes of the concession) to include provisions on matters including competition and data protection.[29] The authorized concession arrangements can also impose penalties on the Operator for failing to comply with obligations under the arrangements.[30] The Act does not specify the circumstances in which a penalty can be applied. These circumstances are probably specified in the 'concession deed'. The concession deed also likely contains provisions linking limiting fees for regulated products and services to movements in the cost of living index (fulfilling a promise the Government made in the second reading speech).[31]

### Termination and re-tender concession

If the concession is terminated before the term expires, the Act authorizes a re-tender concession.[32] This would allow another operator to take the Operator's place. The re-tender concession can be for an additional term of 35 years and is not limited to the remaining term of the original concession.[33]

### Employees

The Act provides for the transfer of permanent employees and certain contract employees to the Operator, with an employment guarantee of 4 years after the date of the transfer.[34] Casual employees have no employee guarantee period. Transferred employees have

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[27] Ibid, s 15(1).
[28] Ibid, s 15(2).
[29] Ibid, s 13(1)(c).
[30] Ibid, s 16(1).
[31] New South Wales, Second Reading Speech, *Legislative Council,* September 21, 2016, https://www.parliament.nsw.gov.au/bill/files/3330/2R%20Land%20and%20Property_1.pdf
[32] *Land and Property Information NSW (Authorised Transaction) Act 2016,* s 18(1).
[33] Ibid, s 18(4).
[34] Ibid, s 21(6)(a).

continuity of employment and retain rights to sick leave, annual leave, and extended and long service.[35]

### Emergency step-in powers

The Act gives the Government emergency powers to step back into the business and resume control. The portfolio Minister may issue an Administrative Order to the Operator 'if the portfolio Minister thinks it is reasonably necessary to do so to avert a threat or likely threat to the integrity of the Register'.[36] This is a powerful provision, which at face value can apply when the portfolio Minister *anticipates* a likely threat, even without an actual threat occurring. Presumably, this is intended as a last resort option.

### Operator entitled to revenue

The Operator is entitled to all revenue collected, received or held in connection with the exercise of any titling and registry functions.[37]

## FUTURE CHALLENGES FOR THE OPERATOR

The Operator is likely to encounter many challenges during the concession. They will probably center around two key areas.

The first is the need to constantly invest in new technology in a fast-developing technological era. The Government held the strong view that allowing the private sector to operate the titling and registry functions of LPI would create new opportunities for investment in new technology due to the commercial incentives for doing so.

The second is the need to maintain the integrity of the Register and cadaster in an era of cyber-threat. The Operator will have to ensure the continuing integrity of the Register and cadaster, particularly as it moves toward a fully digitized system of land title registration. How it meets these challenges only time will tellsity of Sydney for his comments on the draft paper.

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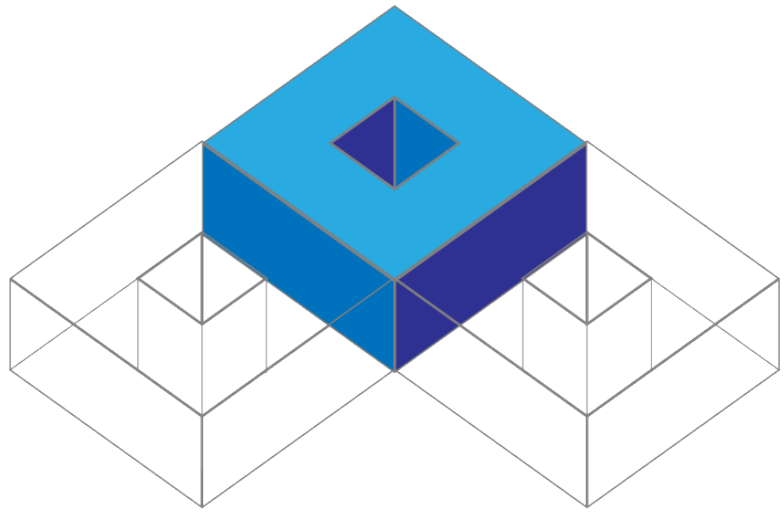
[35] Ibid, s 22.
[36] Ibid, s 26.
[37] Ibid, s 42(1).



THE PRIVATIZATION OF THE REGISTRIES

# Issues to consider when privatizing a land registry

**Alasdair Lewis**

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I was the Director of Legal Services and Deputy Chief Land Registrar for Her Majesty's Land Registry for England and Wales from 2010-2017. In that capacity, I worked on all privatization proposals, mostly leading projects that studied what legislation would be required to make privatization possible and how a privatized land registry would be regulated.

In this paper, I discuss some of the issues that must be considered when privatizing a land registry, drawing on my experience with HMLR over the last 7 years.

## REASONS TO PRIVATIZE

In most cases, minsters want to privatize their land registries in order to generate a capital receipt. Land registries charge fees for their services. If those fees exceed the cost of running the registry, the surpluses can be capitalized. The privatizations we have seen in Canada and Australia have consisted of a long-term contract or concession being sold to a private sector operator. In return, the private sector operator obtains the right to collect the surpluses over the life of the contract. The privatizations have attracted organizations looking for guaranteed returns over a long period, such as pension funds.

However, raising money may not be the only or primary reason to privatize. There is a belief that private sector managers will run the land registry better than the public sector. They are believed to be not only more efficient, but also better able to deliver change in a faster, more innovative manner. Improvements in registry management can give citizens a faster, cheaper service.

Another reason to privatize is risk transfer. Much of the land registry's income depends upon the health of the property and mortgage markets. If those markets crash, as they did in 2007/8, the fees generated by the registry will not cover its costs leaving the government to cover the shortfall. Through privatization it might be possible to transfer this risk to the private sector.

The reasons for privatizing will determine potential buyers and would shape the final contract. It is therefore essential that government officials are clear about exactly why they want to privatize before they start the process.

## FUNCTIONS INCLUDED IN THE SALE

Land registries perform a range of functions, some of which may already be carried out in partnership with the private sector. It is unlikely that all the registry's functions be included in the sale. It is therefore necessary to decide which functions are going to be performed by the private sector operator and which are not.

If some functions are going to be retained by the state, it must be decided how many staff are needed to perform those functions and who those people are. The contract with the private sector operator needs to make provision for that operator to pay the costs associated with the retained functions.

Absolute clarity about what functions are being privatized and which are not is required to ensure that, post-sale, all functions are still performed. This clarity is also required to enable the necessary legislation to be drafted.

## PRE-REQUISITES FOR PRIVATIZATION

Land registries, and in particular title registries, carry out a legal function, namely the creation and grant of legal interests in the land. The act of registration confers a legal title on the person whose name is entered on the register of title. The courts must recognize those titles created by the registrar. For the registration system to work, the courts must recognize the decisions made by the privatized land registry in the same way and to the same extent as the decisions made by the state-run land registry. To achieve this, two things must be put in place before the registry is privatized.

The first is a new legislative framework. The new legislation must make it clear from whom the private sector operator derives its authority. The simplest way to achieve this may be to keep the position of Chief Land Registrar as a public employee and for that person to delegate his functions to the operator.

The second is a robust regulatory framework. Land registries are natural monopolies; you will never find two rival registries operating in the same territory. Private sector monopolies, especially utilities, must be regulated to ensure they operate in the public interest and to ensure that citizens and taxpayers get value for money from the sale. That regulatory framework needs to include redress systems, such as appeals and independent complaint procedures, for unhappy customers. If the role of Registrar is retained, that person can be the regulator in addition to performing the retained functions.

## LAND REGISTRY FEES

When privatizing a land registry, it must be determined when, how and by whom fees for using the service are going to be set and collected. There are three main options.

The first option is for the state to continue to set and collect the fees. The state would then pay the private sector operator for performing the functions delegated to it, perhaps on a per-case basis.

The second option is for the state to set the fees (i.e. determine the level of fees) and for the private sector operator to collect them as part of the registration process. The contract would need to describe how fees are going to be set, perhaps by reference to a formula based on cost of living and would need to explain how the income collected would be split between the state and the operator.

In the third option, the private sector operator would determine the fees and collect them. The contract would need to explain how those fees are going to be regulated in order to stop the operator abusing its monopoly position.

The option chosen will in part depend upon which party to the contract is taking the risks associated with rises and falls in the market.

The contract and the legislation need to explain what would happen should the private sector operator cease to trade. The state would want to have the option of bringing the service back in-house, but the state must be realistic about how feasible this would be if, by that point, the service had been delivered by the private sector for several years. The state might also want to provide for the claw-back of excessive profits although, of course, any such provision would affect the sale price.

## COMPENSATION CLAIMS

Title registries compensate innocent parties who suffer loss caused by mistakes on the register of title. Typically, registries retain surplus fees in a compensation fund to meet the cost of claims in the future.

As a matter of principle, the privatized land registry should pay any claims that arise as a result of mistakes made by its staff.

It is a feature of land registries that it can take many years before a mistake results in a claim. At HMLR, I saw claims that took as long as 30 years to materialize. If the land registry is privatized, the state organization must decide how these claims are going to be dealt with.

At HMLR, we worked with actuaries to evaluate claims that have been "Incurred But Not Reported" (IBNR). An IBNR provision was made in our accounts and funds were earmarked in our reserves. This gave us the option of either retaining these funds when the functions were privatized or of transferring the funds and the liability to the private sector operator.

## DATA

Land registries hold huge amounts of data. HMLR holds information about over 25 million properties and over 30 million owners. Much of the data is personal data.

The data is very useful and potentially valuable. In order to maximize the capital receipt, public officials will want to include the data (or at least the right to exploit it) in the sale.

The first question to be answered is "Who owns the data?". Is it owned by the state or do property owners own the data relating to their properties? In the England and Wales context, we concluded that the data is owned by the Crown and so could, potentially, be included as part of the deal.

The second question is whether the private sector should be given the exclusive right to exploit the data or whether others should also be allowed to access it. A balance will need to be struck between maximizing the capital receipt and gaining the wider, societal benefits derived from making the data open.

## TRANSFORMATION

All land registries have ambition to digitize their registers and the services they provide. As part of the privatization process, the state must decide who is going to fund the transformation and who is going to reap the benefits of it. Ministers need to decide whether they are going to insist that the private sector operator completes the transformation and, if so, on what timescale.

Digital transformation is expensive. To make a return on investment, the operator will

want to be sure that everyone moves from paper channels to digital. As part of the privatization, government officials need to decide whether, and if so how, the use of digital is mandated.

## RESISTING TEMPTATION

There are some obvious ways to increase the capital receipt and generate more interest in the asset, including increasing land registry fees, minimizing regulation and reducing the scope of the "state guarantee". However, taking these steps requires careful consideration.

For example, if the scope of the state guarantee is reduced, private title insurance will look to fill the gap (something we have seen in parts of Canada). This might lead people to question the purpose of the land registry. They might conclude that they are better off not registering their transactions and relying on insurance instead.

## CONCLUSION

It is for ministers, not registrars, to decide whether the land registry should be privatized or not. However, the registrar does have a key role in ensuring that ministers understand the issues and risks and how those risks can be managed and mitigated.

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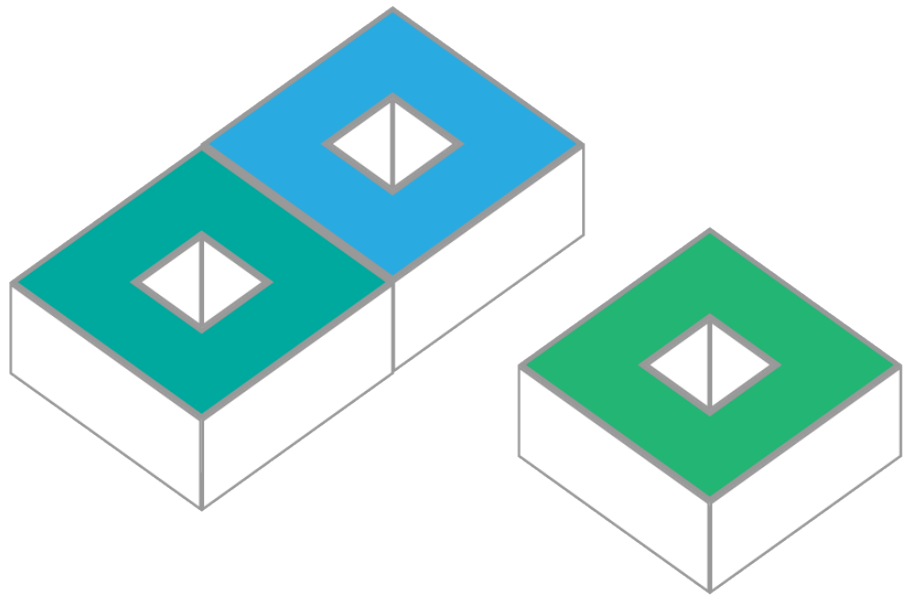
Appendix

Link to the 2014 Consultation: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/274493/bis-14-510-introduction-of-a-land-registry-service-delivery-company-consultation.pdf

Link to the 2016 Consultation: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510987/BIS-16-165-consultation-on-moving-land-registry-operations-to-the-private-sector.pdf



THE PRIVATIZATION OF THE REGISTRIES

# Debunking myths surrounding the privatization of land registries

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Save and except for the imminent demise of all government roles in land registration prognosticated to be brought about by the so-called "blockchain revolution" (said with tongue-in-cheek lest my hyperbole fails to convey my skepticism!), the privatization of land registries seems to be one of the most popular topics among civil servants involved in land registration, with recent privatizations in Australia fetching billions of dollars for the governments that have privatized their registries. In an age of near-universal fiscal constraint in the public sector, and large pension and sovereign funds looking for novel asset classes in which to invest worldwide, even land registrars who view the concept of privatization with disdain need to be cognizant of the myths that surround privatization.

Critics have argued that privatization inevitability leads to increased user fees (or its corollary, decreased services for the same user fees), the loss of government oversight of the registration function, the inevitable antiquation (or at least obsolescence) of the technological infrastructure and vulnerabilities in disaster recovery in the event of operator failure.

These bald assertions, *simpliciter*, are myths, and do not stand up to the scrutiny of review. Instead, this paper hypothesizes that privatization is entirely agnostic – privatization does not necessarily give rise to any of the benefits commonly ascribed to it, nor does it necessarily lead to the criticisms that are constantly leveled at it. Instead, privatization is a finance and operation tool that may or may not result in the benefits or evils associated with it.

## DEFINITION OF PRIVATIZATION

As a preliminary matter, it is important to define, for the purposes of this paper, what we mean by "privatization" since, in part, the definition tends to drive the conclusions. Although the nomenclature varies ("public private partnerships", "strategic partnerships", "private sector participations", etc.), for the purposes of this short paper, privatization can be defined as the long-term concurrent combination of service outsourcing and revenue factoring, to the same private sector operator/buyer. Using this definition, this author is aware of four modern cases of land registry privatization:

**1.** Ontario, Canada (2010): Can$1 Billion, 50 years;
**2.** Manitoba, Canada (2014): Can$ 75 Million, 30 years;
**3.** New South Wales, Australia (2017): AU$ 2.6 Billion, 35 years; and
**4.** South Australia, Australia (2017): AU$ 1.6 Billion, 40 years.

Service outsourcing, of course, is simply the contractual retainer of a private sector contractor to perform some function(s) of government historically done "in-house". This can vary in scope from something as simple as janitorial, technological, and office-maintenance services, at one end of the spectrum, to wholesale appropriation of the government function, at the other extreme – but, regardless of scope, probably every government in the world (and, by extension, every land registry in the world), regardless of the current flavor of their political masters, has likely experimented with some sort of outsourcing as part of the management of its operations. In the land registry privatization context, privatization has typically included the outsourcing of all public-facing facilities and staff (except Ontario, which retained its counter operations and public-facing staff).

Factoring is the sale of future revenues receivable for a current lump sum payment made at a present value discount. While the factoring of government revenues is far from universal, the concept has been a part of basic commerce since, well, as long as there has been basic commerce. In the land registry privatization context, the future revenues that have been factored have been the future registration and search fees (and, in those jurisdictions which also have the local realty tax assessment function embedded in the land registry, those fees as well), and incidental fees (such as photocopying revenues). Notably excluded from such factored revenues have been the *ad valorem* taxes imposed by these jurisdictions – either the local annual *ad valorem* property taxes or the transactional *ad valorem* taxes imposed (typically on deeds) at transfer. Curiously, while the pricing of privatization is a factoring model, it is rarely referred to in these stark terms. Indeed, like in South Australia, a privatization by this definition may still be described as a fee-for-service outsourcing (which fee just happens to be derived from factoring mathematics).

In all of the privatization deals described above, there has also been a separate royalty paid by the operator/buyer back to the government over the term of the contract. This royalty payment serves many purposes – ranging from risk re-allocation to political optics – but is essentially nothing more than nuance to the factoring mathematics – the more (and/or sooner) the royalty is payable, the less the lump sum payable to the government at the front end.

As an aside, although much of the privatization nomenclature speaks of a "sale" of the land registry to a private operator/buyer, in each and every case, privatization is more

akin to a "lease" of the land registry for a fixed term of years, and resulting in a theoretical reversion of the land registry to the government (see, for example, New South Wales, which properly refers to its privatization as a lease of the land registry system). While theoretical, the reversion of the land registry to government is far from inevitable, since there is always the possibility of successive privatizations (or renewals of the existing privatization) even after the putative expiration of the current privatization.

## MYTH NO. 1: PRIVATIZATION LEADS TO INCREASED USER FEES

The perception that privatization leads to increased user fees, either immediate or over the course of the contract, is perhaps the single most pervasive myth associated with the privatization of land registries. Ironically, it is also the myth that tends to stray furthest from the truth. Neither component of privatization (i.e. outsourcing or factoring) requires an increase in user fees. Outsourcing tends to lower costs (that is essentially the universal justification for outsourcing) which would not pressure user fees upward. Of course, the almost universal reality is that the operational savings from outsourcing, if any, does not translate to lower user fees, either immediate or over the course of the contract, but that is more a comment on political reality than the economics of privatization.

Likewise, there is nothing in the nature of factoring that tends to pressure user fees upwards. The net present value calculation at the heart of factoring is the same for any projected stream of revenue, and there is nothing inherent in factoring that requires that stream of revenue to increase through increased prices. Opponents of privatization will argue that a government will achieve a larger lump-sum payment if the revenue stream is increased, and that incentivizes an increase in the user fees. The premise is true – a government will achieve a larger lump-sum payment if the revenue stream is increased – but, curiously, that increased revenue stream is rarely, if ever, realized by increasing user fees. User fees are an easily identified metric and political acumen tends to temper any thought of increasing user fees on or in anticipation of privatization, just to increase the lump sum payable to the government (especially since the lump sum payable to the government can be increased by more subtle adjustments to the term or the royalty).

Ontario is proof that user fees do not necessarily go up upon privatization. When Ontario privatized its land registry, the contract specified a seven-year freeze on all common user fees (which had themselves been frozen for many years before privatization), followed by prescribed annual increases in such common user fees thereafter at only *half*

the rate of the corresponding consumer price increases. In effect, Ontarians will be paying, in inflation-adjusted dollars, lower user fees for all of its common services in every year of the 50-year contract than they did before privatization.
Again, privatization itself is agnostic – user fees could increase, or not, all as may be determined by the contract. Any suggestion that privatization necessarily results in increased user fees is simply a myth, and a debunked one at that.

## MYTH NO. 2: PRIVATIZATION LEADS TO DECREASED CLIENT SERVICE LEVELS

This myth is essentially a corollary of Myth No. 1 (i.e. that privatization leads to increased user fees). Critics of privatization will argue that, while user fees might not increase as a direct result of privatization, any cap on user fee increases will inevitably be matched by corresponding decreases in service levels for the same inflation-adjusted user fee.

This is a criticism associated with all outsourcings – the argument that outsource operators will always be incentivized to lower client service levels to maximize their profits under the outsourcing contracts. The motivation is, of course, true (operators will, by nature, be incentivized to lower client service levels to maximize profits) but for the myth to prove true, governments must fail to monitor and enforce acceptable performance standards.

This is an unfair suggestion. The lion's share of all long-term outsourcing contracts is devoted to the establishment, monitoring and enforcement of key performance indicators ("KPIs") by which operator performance and client service are to be measured. This is also the case in the privatization of land registries. KPIs for land registration are relatively known to government (availability of the system, consistency and reliability of the system, turnaround/wait times, client satisfaction, etc.). Indeed, governments typically already monitor and test their own in-house land registries' performances using the same KPIs and base staffing and resourcing decisions based on such metrics. Privatization contracts for land registries contain dozens upon dozens of sometimes very detailed KPIs, with varying and escalating remedies for performance failures.

The implication that there is something about land registry (different than other privatized business lines) that makes it impossible for governments to monitor performance and/or enforce penalties is simply wrong. Is it possible for governments to negotiate inadequate KPIs or, more likely, inadequate remedies for chronic failures

to meet KPIs? Of course it is possible, but the KPIs tend to build on each other (as governments tend to informally share such KPIs and best practices). As such, each successive privatization will tend to see improved and more rigorous KPI arrays than its predecessors, with performance measurement and enforcement bound to improve over time. There is simply nothing inherent in privatization that should necessarily lead to lower client service levels.

Again, turning to Ontario as an example since it has been privatized the longest, client satisfaction with the electronic land registration system over the past eight years in a privatized environment, as evidenced by frequent client surveys, remains excellent. Likewise, high severity performance failures have been relatively infrequent (well within parameters contemplated in the contract), and the response thereto has been consistently adequate. It is known to this author that the KPIs and KPI enforcement protocols in the Australian privatizations are even more stringent than those used in Ontario and there is no reason to believe that client service levels will necessarily suffer in any of those jurisdictions as well as a result of their privatizations.

## MYTH NO. 3: PRIVATIZATION LEADS TO THE LOSS OF GOVERNMENT OVERSIGHT AND ASSURANCE

This too is a pervasive myth about privatization – that privatization necessarily neuters the government oversight function. Critics argue that outsourcing the land registry function reduces the ability or willingness of government to regulate land registration. Although this is a legitimate risk to raise, it has simply not proven to be the case so far.

The risk is a legitimate one. As every reader of this article should already know, land registration is a regulated activity – modern land registries are not freely-editable databases for a reason. Without government oversight, the integrity of the records will rapidly become perverted. There are business and evidence rules governing registrability. Land registrars understand the value that they add – and it is indeed possible (and, sadly, common) for other parts of government to overlook or minimize the regulatory oversight that land registrars provide. As such, there is a legitimate fear that long-term outsourcing could somehow erode that regulatory function because private sector operator/buyers do not necessarily share that regulatory responsibility.

The answer, of course, depends on the degree of outsourcing. To date, no government has outsourced the entire regulatory function, and every such government has

maintained at least some wholly intra-governmental capacity to provide regulatory oversight. This retained regulatory capacity does vary widely between the four jurisdictions that have privatized. Ontario maintains, by far, the largest retained in-government staff (in terms of full-time-equivalent employees relative to registry size) for regulation, verification and policy work (including two directors and their staff, a dedicated technology group, several surveyors, several lawyers, and almost a couple of hundred verification line staff). Manitoba, by contrast, maintains by far the smallest retained in-government staff for regulation, verification and policy work (with little more than the titular head land registrar being maintained inside government). The Australian states that have privatized have landed somewhere in between the two extreme models implemented in Canada.

A perhaps more telling indicator of retained government regulatory functions in Torrens jurisdictions is liability for their respective assurance funds. Integral to a Torrens system is some sort of "title guarantee" backed by an assurance fund. Although the scope of the coverage afforded by such assurance funds varies from jurisdiction to jurisdiction, typically, they provide insurance against errors in the register and, in most jurisdictions, limited insurance against title fraud. It is telling that, in every jurisdiction that has privatized so far, the government has maintained liability for that jurisdiction's assurance fund. Now, this falls short of proof that the same government has not abdicated regulatory or policy oversight while retaining financial liability for the integrity of the records, but it makes better sense that a government that indemnifies against loss would retain regulatory and policy oversight over the registration rules that might give rise to such loss.

With the benefit of hindsight, this author posits that the answer is probably in-line with the Australian models. Ontario probably maintained more in-government staffing than it really needed to provide effective regulatory and policy oversight, and Manitoba probably did not retain enough. Time will tell exactly what balance of retained in-government staffing is needed to provide effective regulatory and policy oversight, but the general myth that privatization *per se* leads inevitably to loss of effective government oversight is clearly debunked in practice.

## MYTH NO. 4: PRIVATIZATION LEADS TO THE INEVITABLE OBSOLESCENCE OF THE INFRASTRUCTURE

Privatization arrangements are, by their nature, long-term. This is driven by the factor-

ing component of privatization. Outsourcing arrangements alone can be, and typically are, short-term contracts, but the sale of future revenues at a discount tends to justify transaction costs only on relatively long timelines. Critics have argued that the length of such privatization deals all but guarantees infrastructure obsolescence – the argument being that a private operator/buyer does not have an incentive to keep the infrastructure modern, especially toward the end of the contract, for fear that it will not be able to fully amortize the capital costs of such infrastructure over the remaining balance of the contract. Although the argument applies to all infrastructure in all privatization deals, in the context of the privatization of land registries, this argument inevitably relates to technological infrastructure. Regardless of where a land registry is in terms of its march towards electronic search, electronic recording, and electronic archiving, there is not a single land registry in the world that isn't somewhere on that digital path. As such, the criticism can be re-phrased as "privatization leads to the obsolescence of digital technology".

This criticism is also a myth, at least expressed as an inevitability. The fact of the matter is that privatization is totally agnostic to infrastructure investment – a privatization model can support as much or as little infrastructure investment as the contract specifies. A contract can specify technology spending in terms of amounts spent, standards met, or any combination thereof. Manitoba is a good example – in addition to the lump sum payable to the government, there was a further $ 35M up-front system development expenditure commitment for the land registry. Alternatively or in addition to such up front capital commitments, the operator/owner may be contractually required to contribute certain amounts annually and/or periodically meet or exceed a certain industry technological standards from time to time. No matter how the technology modernity commitment is to be performed, fulfilment can be tested with KPIs in the same way that client service is measured (indeed, technological modernization and client service go hand in hand in the era of all or near-all digital land registries), with similar remedial responses for non-compliance.

Admittedly, drafting the standards and KPIs for technological maintenance, refreshment, and modernization is not easy. Technology develops faster than lawyers can possibly anticipate. In a long-term contract, it is all but impossible to anticipate future technological developments – when Ontario fully privatized in 2010, "blockchain", "the cloud", and "artificial intelligence" were barely even concepts on the horizon, and CD-ROM was the prevailing data storage medium! While the drafting of KPIs and other technology standards can be difficult, it is not impossible to at least develop some sort of

governance protocol that sees periodic review and refreshment, by mutual agreement if possible, but by third-party arbitration where consensus cannot be reached.
Technological obsolescence is simply not a foregone conclusion with privatization and any suggestion to the contrary is a myth – a debunked one at that.

## MYTH NO. 5: PRIVATIZATION LEADS TO VULNERABILITIES IN DISASTER RECOVERY AFTER OPERATOR FAILURE

Even if critics of privatization concede that strict KPIs together with progressive remedial discipline in the contract can control operator conduct over the long run, they will often point out that the ultimate remedy (termination of the outsourcing contract) is all but practically impossible because the government that has privatized will no longer have the technical resources necessary to run a land registration system even if the outsourcing is cancelled and the land registration function returns in-house. So, if the operator fails, for whatever reason, to perform (and the recent bankruptcy protection of the Carillion group of companies worldwide has raised that specter for a number of privatization projects), even if the government can get the land registry back, the argument is that the government will not be able to run a land registry anymore, rending the remedy toothless and all but illusory.

This too is a myth. The land registry of the future will be comprised of three broad components: (i) software and hardware; (ii) production and verification staff; and (iii) regulatory oversight. We have already established that, at least so far, government has always retained regulatory oversight so, in the event of a catastrophic operator failure resulting in the forfeiture of the contract, the regulatory function will already be available in-house at the government.

Furthermore, most technology outsourcing contracts have provisions for "lock-boxed" master copies of the software, together with verification protocols to ensure that the government's copy of the software is current and functional. So, in the event of a catastrophic operator failure resulting in the forfeiture of the contract, the software will also be available in-house at the government (presumably the hardware will be sufficiently generic to be readily available as well).

That just leaves the production and verification staff. It is true that the production and verification staff will not be readily available in-house because most of them will have left government to join the private operator/buyer at the time of the privatization, but

the very fluidity of labor that allowed the migration of skilled labor out of the government at the time of privatization will also allow that same labor force to be re-absorbed into government after the cancellation of the operator's license – it is not as if the bureaucrat familiar with the supervision of a land registration system has multiple job offers available for equivalent work in the private sector!

This is not to trivialize the severity of a re-absorption of the land registration business back to government if the privatization is ever cancelled. If that happens (presuming that the land registry is not then immediately re-privatized), it will be a monumental transformation to be sure, but the point is that it is far from impossible as the myth would otherwise have one believe. Privatization simply does not create an insurmountable vulnerability in disaster recovery even if the operator/buyer fails.

## MYTHS ON THE OTHER SIDE

This brief paper has outlined and hopefully debunked five common myths associated with the privatization of land registries. The myths can collectively be persuasively met with the proposition that privatization is largely agnostic – privatization, *per se*, is simply a concurrent outsourcing of land registration functions coupled with a factoring of future land registration revenues: nothing more, nothing less. As such, it does not inherently lead to many of the burdens ascribed to it – privatization can be what the parties contract it to be.

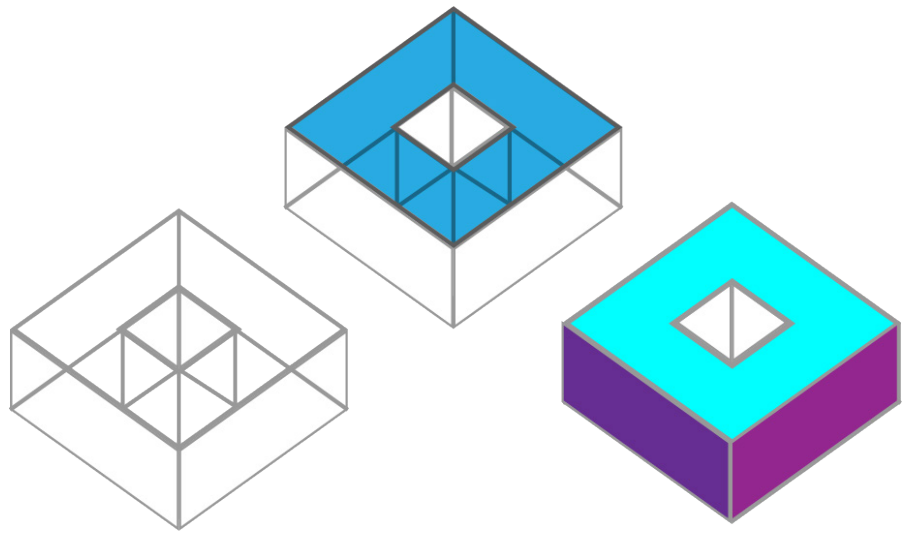
On that very same note, much rhetoric about the benefits of privatization is also myth, and can also be met with the same proposition! Time and word count limitations prevent this paper from exploring the myths on the other side of the debate in more detail, but such myths can also be debunked by concluding that privatization is largely agnostic and, as such, does not inherently lead to many of the benefits ascribed to it – again, privatization is only what the parties contract it to be.

## CONCLUSION

This author predicts that many more jurisdictions will be considering the privatization of their land registries in the very near future. Privatization gives governments a relatively large immediate influx of capital (through the factoring of future land registry fees) to be applied to whatever political priorities the government sees fit. Furthermore, privatization of land registries transfers what could be a relatively large number of full-time-equivalent government employees to the private sector (through the out-

sourcing of such services), and governments the world over seem anxious to reduce the sizes of their respective civil services. Further fueling this predicted wave of future land registry privatizations is the existence of large pools of money (e.g. pension funds, sovereign wealth funds, and other capital market participants) actively seeking new asset classes in which to invest, and the numbers can, certainly as the recent Australian deals have confirmed, be staggering.

The rhetoric surrounding privatization is largely a collection of myths of generalization, coming from both pro-privatization and anti-privatization camps. Privatization is, instead, largely agnostic and does not inherently lead to either the burdens or the benefits typically ascribed to it.  As generalizations, they are all myths. In each such case, it depends on the terms of the contract itself – which can be good, bad or ugly – but there is nothing inherent in privatization that will lead to any particular burden or benefit.



THE PRIVATIZATION OF THE REGISTRIES

# HM Land registry: public or private?

**Peter Sparkes**
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**When Mrs. May's Conservatives made their pitch to the British electorate in 2017, they pledged that:**

*'We will use digital technology to release massive value from our land that currently is simply not realised, introducing greater specialisation in the property development industry and far greater transparency for buyers. To make this happen, we will combine the relevant parts of HM Land Registry, Ordnance Survey, the Valuation Office Agency, the Hydrographic Office and Geological Survey to create a comprehensive geospatial data body within government, the largest repository of open land data in the world. This new body will set the standards to digitise the planning process and help create the most comprehensive digital map of Britain to date. In doing so, it will support a vibrant and innovative digital economy, ranging from innovative tools to help people and developers build to virtual mapping of Britain for use in video games and virtual reality.*[1]

The Prime Minister's failure to secure a majority should not necessarily be seen as a rejection of this particular pledge, tucked away on page 82 of an 84-page manifesto, since British electors had more immediate concerns to address when deciding how to vote. Indeed, even if she had received an unequivocal mandate to handle the complexities of Brexit, it is hard to see that this proposal would have been a high legislative priority, given the speculative nature of the economic benefits. Even as an unimplemented proposal, it raises rather important issues about the role of a land registry and the extent to which a land owner is entitled to privacy, which this brief note attempts to address.

## PUBLIC OR PRIVATIZED AGENCY?

The Land Registry displays its lineage stretching back to 1862 by describing itself as Her Majesty's Land Registry. Today it is the only executive agency so designated out of the 46 within the remit of the Department for Business, Innovation and Skills. The registry has faced innumerable reviews of its operations over the years, including several recent proposals for full privatization.[2] A previous proposal made in 2014 failed when it revealed fault lines in the Coalition Government between Conservative and Liberal Democrat ministers. This was revived in the Autumn Statement delivered in 2015 by

[1] *Forward Together - Our Plan for a Stronger Britain and a Prosperous Future* (London: Conservative and Unionist Party, 2017) ('*Forward Together*'), p 82.

[2] Hannah Cromarty *Land Registry Privatisation* (HC Library Briefing Paper 07556, December 2016), chap. 2, 3.

George Osborne. This would have yielded £1.2 billion for the Treasury,[3] which was unusually candid about its motivation:

> *'The balance lies in favor of sale, releasing resource that can be used elsewhere ... This is the primary driver for change.[4]'*

When this was put out to consultation it attracted opposition from the Labour Party, individual MPs, trades unions, organizations involved in the data society and groups of conveyancers and their consumers, as well as over 300,000 signatures from members of the public on a petition. The idea was buried in the subsequent Autumn Statement delivered by the subsequent Chancellor, Philip Hammond, in 2016.[5]

HM Land Registry remains a public agency for the time being, but who can guess what a future Chancellor may think?

## OPEN OR PRIVATE DATA?

It is characteristic of property rights that they bind the world. It seems to follow that an important function of a property system is to provide the world with notification of existing property rights, or at the very least to render property rights discoverable. The main function is notification to the world of plots that are in private ownership, but it is also important to be able to discover other property rights such as easements/servitudes, so precise property rights need to be disclosed. A land owner who creates an easement of servitude creates a relationship first with the owner of the dominant tenement – perhaps allowing him to pass and repass over a specified driveway – but also with every member of the public. Whenever an easement adds a private right over land to which the public already have access – for example allowing a neighbor to drive over a track which is already a footpath – conduct of a member of the public using the footpath could be a breach of the neighbor's private right to drive over the track. So, precise property rights must be made known to the public – presumably through a register. This is particularly the case with systems such as English law which allow a trespass action against any person interfering with another's property irrespective of fault.

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[3] HM Treasury *Spending Review and Autumn Statement 2015* (Cm 9162), para 1.302.

[4] Consultation on *Moving Land Registry Operations to the Private Sector* (London: Department for Business and Skills, March 26th 2017), para 27.

[5] HM Treasury *Autumn Statement 2016* (Cm 9362), para 1.66.

Different systems have adopted very different approaches to publicity. Normally reliance is placed on either boundary markers or a cadaster. *Boundary markers* were the Roman method, set down officially to mark a taxable unit and coincidentally an exclusive private domain, and so severe penalties were laid down against anyone moving or obliterating markers.[6] Such a system is expensive, especially when a plot is subdivided. Roman boundary markers worked well with physical plots (perhaps associated with a perambulation) but less well with servitudes. A right of way over a track in the early Republic had to be seen as a concrete thing – so that the track itself was the property. In the later Republic and in classical law, on the other hand, intangible servitudes were recognized which could not be demarcated on the ground. Roman law never worked out satisfactorily how to grant publicity to incorporeals.[7] A similar system of boundary markers is in place in some of the Nordic states today, even associated with global positioning and an electronic register, but here one sees that a system of officially designated boundaries requires an extensive and expensive profession of surveyors.[8] *Cadastres* have a venerable history, back to Roman times and beyond, and were used originally for taxation. In more modern times they have doubled up by demarcating the plots to be registered in the land register. They often overcome the problems just discussed by including rights associated with plots and responsibilities attached to them, but not always.[9] People dealing with land today are entitled to expect and receive easy, low-cost access to the cadaster, but, in practice, many cadasters are defective, either in terms of access arrangements, the scale of the mapping, or the accuracy of records.[10] Continental systems tend to have open cadasters and closed registers.

This leads us to the shift from private conveyancing to the open register in England and Wales, taking the privacy of unregistered conveyancing first. Land holding was originally feudal, and it was essential that ownership was open so that the Lord knew from whom to collect feudal dues – which were due from the person with seisin, the person in actual possession. A transfer of land required livery of seisin, that is a transfer of physical control, usually accompanied with a ceremony to make the transfer memorable and

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[6] The severe sanction of sacrifice was attributed to the legendary second king, Nunna Pompilius, 716-673BC.

[7] A Watson *The Law of Property in the Later Roman Republic* (Oxford: Clarendon, 1968), ***

[8] P. Sparkes et al, 'Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens' (Brussels: European Parliament, IP/C/JURI/IC/2015-009), para 4.3.1.

[9] Cadastral Template 2.0 (www.casdastraltemplate.org

[10] Sparkes, 'Cross Border Acquisitions', para. 4.2.3.

notorious in the locality. Title to land was rendered crystal clear in pre-documentary days. Legislation in the reign of Henry VIII was designed to curb the circumvention of the feudal system by the device of the use (a forerunner of the modern trust), where the legal estate owner A held to the use of B. In order to reinforce the Crown's feudal revenue, uses were negated by the Statue of Uses 1535 which provided that if land was convened to A to the use of B, the use was executed and legal title and seisin passed to B. Superficially, this enabled a transfer of land to be conducted in private, but this possibility was blocked off by the contemporaneous Statute of Enrolments 1535 which required conveyances to be enrolled publicly (rather in the manner of the present-day deeds registry in France). At that stage, therefore, the advantage lay decisively with the King and the forces of openness. Ways round this had been discovered within 30 years, and were later perfected as the conveyance by lease and release.[11] Instead of transferring the freehold from A to B, A granted a lease to B for less than one year, and later released the freehold reversion to B; neither of these transactions had to be enrolled, so the freehold was conveyed with restored secrecy. When, in the nineteenth century, reforms introduced a straightforward transfer, secrecy was retained.[12] Secrecy achieved by undermining Henry VIII's feudal legislation thus remains a cornerstone of unregistered conveyancing almost 500 years later.

The fledgling registry had to mimic the unregistered system, as otherwise the desire for privacy would have led to registration being stillborn. It was therefore provided that a person wishing to inspect the register had either to demonstrate an interest in doing so or produce the proprietor's authority to inspect the register by the vendor,[13] these rules mirroring, and probably copied from,[14] the process of getting access to the German Grundbuch.[15] Registered conveyancing remained private until 1990, when the register was opened[16] to bring it into line with other sources of public information.[17] Those with

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[11] AW Simpson, *A History of the Land Law* (Oxford, 2nd edit., 1986), pp.188-190.

[12] Conveyance by Release Act 1841; Real Property Act 1845 s 2; Law of Property Act 1925 s 51.

[13] Land Registration Act 1925 s112 (confirming earlier Acts of 1862 and 1875); *Quigly v Chief Land Registrar* [1993] 1 WLR 1435, 1436H, Hoffmann LJ.

[14] Charles Fortescue Brickdale *Systems of Registration of Title Now in Operation in Germany and Austria-Hungary - Report of the Assistant Registrar at the Land Registrar,* 1896 C 8139.

[15] *Grundbuchordnung* art 12.

[16] Land Registration Act 1988, in force December 3rd, 1990.

[17] Second Report on Land Registration (Law Com 148, 1985).

legitimate business affecting the land find it much more convenient, since a genuine buyer can get all the information he needs without having to trouble the proprietor to produce an authority to inspect the register, but it may have assisted fraudsters and busybodies.

All information recorded on the register is now open to public inspection. Until 2003, this included the register entries, filed plans, and documents referred to on the register, as well as any caution affecting first registration of the land and the index of proprietor's names. Since implementation of the Land Registration Act 2002 (on this point in October 2004) it has also included leases and charges, even if they were created pre-Act, so a homeowner can no longer keep secret the amount of money he has borrowed.[18] The open register provides a ready means of ascertaining the name of the proprietor of a particular parcel of registered land, but a search of the Index of Proprietors' Names to reveal details of all land held by a particular person can only be made by a person establishing a sufficient interest.[19] Celebrities can use a trust to keep names in the public eye away from the register.

From 1898 until 1976, the price that the proprietor had paid for the land appeared on the register, at a time when the register was closed. It was then withheld because of the fear that the information could stoke up resentment about profits made by sellers in a rising market. However, the absence of this information led to an increased danger of mortgage fraud which depends upon artificially inflating the apparent value of a plot. So a return to the old way was proposed for the new open register.[20]

In summary, anyone can inspect the register on payment of a fee of £3 (or double that for a pack including both register and plan), whether they are an intending purchaser, a neighbor, a developer, a journalist, a detective, a random snooper or a busybody. Property rights can, of course, bind people who are unaware of them because they have not inspected the register, due to the fact that they could find out what rights affect them if they chose to do so. The open register established in 1990 no longer appears controversial.

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[18] Land Registration Act 2002 s 66.
[19] Land Registration Rules 2003 r 11.
[20] Land Registry Consultation Paper, October 23rd, 1997.

## AN OPEN DATA PROVIDER?

In the forty years since the election of Mrs. Thatcher as Prime Minister (1979) the housing market has spun out of control. The only provider of data over that timescale is the Nationwide Building Society, which publishes these average prices:

| Year | England £ | London £ |
|---|---|---|
| 1980 | 22,677 | 30,538 |
| 1985 | 33,200 | 54,428 |
| 1990 | 59,587 | 72,884 |
| 1995 | 51,084 | 74,161 |
| 2000 | 77,698 | 147,704 |
| 2005 | 152,790 | 241,897 |
| 2010 | 162,887 | 282,948 |
| 2015 | 188,566 | 456,229 |

Nationwide Building Society[21]

When the register was opened, the Land Registry began to publish housing price statistics, and these have become established as the most reliable statistics available. More recently, the Office of National Statistics has published a UK House Price Index (HPI) drawing on data from all the registries within the United Kingdom; this has been published since June 2016.[22] A cursory glance at these figures will reveal relatively controlled growth during the Thatcher era, two sharp recessions in the early 1990s and the late 2000s, the latter associated with the Global Financial Crisis, but very sharp rises during the first decade of New Labour (1997-2007) and renewed growth under the coalition led by David Cameron elected in 2010. During the latter part of this period, inflation and interest rates have been at historically low levels. One can also readily see that a relatively modest London premium existed in the mid-1990s. Since that time, London prices have escalated to eye-watering levels.[23]

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[21] www.nationwide.co.uk.

[22] Available on gov.uk.

[23] The disparity is even greater if one compares to London prices to those in England and Wales excluding London.

There is a general agreement that the current position is unsustainable, not least because it conceals a generational divide between the haves and have-nots. There is also general agreement that the basic problem is that the demand for homes vastly exceeds supply, or, in the words of the most recent Housing White Paper:
The housing market in this country is broken, and the cause is very simple: for too long, we haven't built enough homes. Since the 1970s, there have been on average 160,000 new homes each year in England. The consensus is that we need from 225,000 to 275,000 or more homes per year to keep up with population growth and start to tackle years of under-supply.[24]

Four proposals are outlined in *Fixing Our Broken Housing Market,*[25] of which the second (building homes faster), third (diversifying the market) and fourth (helping people now) lie beyond the scope of this paper. This leaves the first group of proposals, 'Planning for the right homes in the right places' for discussion here.

The Land Registry plays a vital role in this first group because it is becoming increasingly difficult to find land upon which to build in the large number of homes needed. Brown-field sites have been favored recently, but even though smaller and smaller homes have been squeezed into disused corners, such sites are nearly inexistent today. The problem has therefore to be tackled by bringing greenfield sites into play. Here, the planning system introduced in 1947[26] has proven to be an effective brake on development.

It hands decision-making on development over to local councils, which are composed of councilors elected by local residents, creating in practice a predisposition towards NIMBY (Not In My Back Yard) -ism. Undoubtedly, there will eventually be enough young people disentitled by the property market to form a voting bloc that can seek re-dress within the democratic process, but at present the interests of existing owners are prevailing over the needs to those seeking access to housing. Local authorities should be making plans for new housing to meet requirements and identifying land to fulfill

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[24] *Fixing Our Broken Housing Market,* (Cm 9352, February 2017) (hereafter *Broken Housing Market*), 9. This paragraph quite correctly identifies the Conservative government led by Mrs Thatcher as presiding over the original under-supply, refreshingly candid in a White Paper issued by a Conservative government.
[25] *Broken Housing Market*, pp 18-19.
[26] Town and Country Planning Act 1990.

those needs. The government proposes various measures to improve plan-making and to facilitate more accurate assessment of housing requirements.[27]Overall, the policy for 'Making enough land available in the right places' stands,[28]which will be impressive if it can be achieved.[29]

The role of the Land Registry is in 'Making land ownership and interests more transparent'.[30] The official perception is that limited availability of land and property data is hampering the supply of land coming forward for development.

HM Land Registry will continue to operate the register of title. The register is already virtually complete for private titles, with the exception of some corporate farms where the land itself is never traded, but there is only 83% coverage of the land area because of the exclusion of utilities and public land. The government has set the Land Registry the aim of achieving comprehensive land registration by 2030.[31] Public land in need of registration will be, in turn, listed, prioritized and registered.[32] It is clear that if the register is to become a vehicle for identifying and researching large scale development sites, the exclusion of public land can no longer be tolerated. Since many countries already have comprehensive registers, this may be a necessary step towards competing on a global scale, but it is by no means sufficient on its own to secure the goal of 'becoming the world's leading land registry for speed, simplicity and an open approach to data'.[33]

This will require modernization of the Land Registry and its transformation into a 'digital and data-driven registration business',[34] a process which has begun by seeking to engage staff in understanding the process. Many strands can already be identified in this process.

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[27] *Broken Housing Market*, para. 1.10-1.16.

[28] *Broken Housing Market* para. 1.22ff.

[29] Doubts were expressed on the national BBC news by Prof Christine Whitehead, October 2nd, 2017.

[30] *Broken Housing Market*, para. 1.17ff, A.29ff.

[31] *Broken Housing Market* para. 1.18, A.32. Areas to be talked first are identified in Comprehensive Registration programme – Prioirty Areas for land Registration (London: Department for Communities and Local Government, September 2017).

[32] *Broken Housing Market* para. A.32.

[33] *Broken Housing Market* para. 1.18.

[34] *Broken Housing Market* para A.30.

One is a digital transformation, with the intention of making comprehensive data readily available to citizens, customers, entrepreneurs and government,[35] especially when added to new technology such as the 'Digital Street'. One should, however, recall that recasting of the registration legislation in 2002 was intended to pave the way for groundbreaking electronic conveyancing, a vision that has not been delivered.

A second strand in the transformation has to be a review of the scope of registration. The government aspires to a 'clear line of sight' across land ownership, control and incumbrances, which implies that gaps in the data collected on the register, solely in terms of title information, need to be reconsidered. Aspects identified are:
- information about contractual rights such as options;
- information about land banks;
- open release of commercial and corporate ownership data;
- reform of restrictive covenants.

The limited nature of this official list is amazing. A basic principle of any register is the mirror principle, that the register should reflect the current title. In the system operating in England and Wales, this mirror is blotched and cracked: some of the rights which would concern a developer and could not be identified from the register are:
- off-register transfers;
- beneficial interests under trusts;
- rights which could be registered but are instead protected by occupation even against commercial land (options being just one example);
- short leases, even on commercial land;
- overriding interests which bind land without registration;
- longstanding adverse possession rights;
- detailed information about boundaries;
- much better plans.

The gaps in the English register render it 'holey' when compared to other European systems. However, filling these gaps would merely bring the register up to international standards without in any way making our registration a world leader. The Conserva-

[35] HM Land Registry *Annual Report and Accounts 2016* (London: HC84, 2017), p. 11.

tive Party manifesto spoke of 'far greater transparency for buyers'.[36] One suspects that considerable reform of substantive property law principles would be needed to enable the gaps to be filled; a useful place to start would be to plug the registration gap by backdating the effect of registration to the date of completion of the transaction and to abolish the equitable property rights which duplicate every legal right.

A third strand is the proposal to integrate the Land Registry with other providers of land data. The policy announced is for the Land Registry to work more closely with the Ordnance Survey to provide a 'digital land and property data service.'[37] The Conservative Party manifesto threw into the mix relevant parts of 'the Valuation Office Agency, the Hydrographic Office and Geological Survey'[38] with the aim of creating a comprehensive geospatial data body within government, the largest repository of open land data in the world. One can see the benefits of ready accessibility to land information which would need an even wider remit to be useful – including, for example, mining records, environmental designations and commons. Whether that sort of information (which may be a best guess) is compatible with precise and guaranteed records of title remains to be seen. Surely the crucial issue is whether digitizing the planning process is feasible or not, either the planning title to property or the planning process. The Manifesto speaks cautiously of the registration body being able to set the standards to digitize the planning process.

In other words, the Conservative Party is not seeking to pick a fight with local councils where planning powers reside, which may be blue (Conservative) or other colors in terms of political persuasion. Therefore, it may be questioned whether an expanded Land Registry is really a suitable vehicle to releasing massive value from our land that is currently not realized, or to help people and developers build[39].

That idea looks like a piece of alternative reality. The Registry can provide information, possibly in a form better suited to promoting development, but the inherent stasis of the planning system is what really needs to be tackled.

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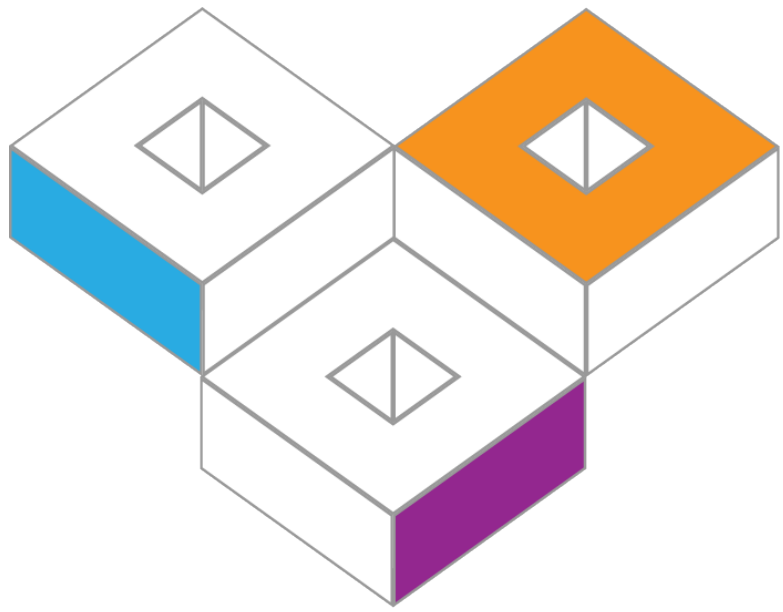
[36] *Forward Together*, p 82
[37] *Broken Housing Market*, para A.31.
[38] *Forward Together,* p 82.
[39] *Forward Together,* p 82.



REVIEW

# *Transfer of immovables in European Private Law* in *The Common Core of European Private Law*

**L.M. Martínez Velencoso, S. Bailey and A. Pradi**

Cambridge: Cambridge University Press, 2017, 416 pp.

**Reviewed by Benjamin Verheye**

The latest (16th) book in The Common Core of European Private Law series concerns one of the cornerstones of European private law research: the transfer of immovables. Why a cornerstone? First, all EU Member States grant a large importance to immovables and the transfer thereof. This, however, does not come as a surprise. On the one hand, from a legal historic point of view, immovables were once considered to be the only important assets ("*res mobilis, res vilis*", or "a movable is a vile thing"). On the other hand, although times have changed and the possible value of movables is now uncontested, for many citizens an immovable still constitutes their most important asset for which they are willing to incur huge, often life-long debts.[1] Second, like the rules on transfer of movables, the rules on transfer of immovables vary greatly between the various Member States. Given the facts that (1) much research on transfer of movables has already been conducted and (2) the cross-border acquisition of immovables in the EU increases ever more – a matter also lying at the basis of, for instance, ELRA's CROBECO- and IMOLA-projects –, more research on transfer of immovables in Europe is the logical next step. The reviewed book is a very welcome contribution to that research. It is organized in a twofold way, starting with an introductory part with two general contributions, followed by a second part in which the immovable transfer and related land registration rules of 17 different European legal systems are explained on the basis of 15 cases. The book is edited by professor **Luz M. Martínez Velencoso** (University of Valencia), **Saki Bailey** (University of Gothenburg) and professor **Andrea Pradi** (University of Trento). The 19 reporters are all prominent members of the European property law scene.

The main part is composed of two contributions. **Martínez**' contribution, entitled "The Land Register in European Law: A Comparative and Economic Analysis", forms the perfect starting point for this book. The focus on land registers is well-chosen: after all, land registers play a pivotal (albeit not identical) role in all European immovable transfer systems. The introduction approaches this role played by land registers in terms of its economic function: "By offering information on property rights, the Land Register reduces the costs associated with exchanges and facilitates the circulation of goods, and it can therefore be described as an instrument in the creation of wealth." However, a variety of transfer systems exists, and land registers do not play the same role in all these systems. Martínez' sees four main transfer systems of immovable property rights: (1) the monist consensual system (France, Belgium, Italy, etc.), (2) the dualist delivery system (Germany, Austria, Greece, etc.) with immovable publicity constituting the delivery (*Publizitätsprinzip*) and whereby German law additionally upholds the *Abstraktion-*

*sprinzip*, (3) systems that mix characteristics of the previous systems, such as the Spanish one, and finally (4) the common law conveyancing system. This variety of transfer systems goes hand-in-hand with the functions that land registers fulfill in these systems. In Germanic systems, *Eintragung* in the land register (*Grundbuch*) is necessary for the effective transfer of immovable property rights: publicity in the land register thus has constitutive effect. Moreover, the Germanic land register classically also guarantees the validity of the information in it towards certain third parties in good faith (f*ides publica*), which is why it is called a positive publicity system. In other systems, such as the French and Belgian, by contrast, transcription of the deed in the land register only has so-called declaratory effect: it is necessary to gain opposability toward certain third parties (mostly in good faith), but it has no effect on the transfer between parties themselves. In literature, including this contribution, this distinction is often cast in the terms 'title registration' *versus* 'deed registration'. From an economic point of view, both systems have their advantages: deed registration is cheaper, but is classically considered to offer less legal certainty, which is an advantage of title registration that offsets its higher costs. Therefore, from an economic point of view, **Martínez** prefers title registration to deed registration. In the final part of her contribution, the author discusses the possible unifying of land registration law in Europe. In that respect, she lists 8 principles, based on the UNECE and World Bank recommendations, that should be followed in such a harmonization process: the land register should be organized as a real folio; it should be accessible to all, but taking into account data protection rules; only relevant, comprehensive and understandable information should be distributed; unpublished information should be non-opposable; the land register should be complete; the published property rights must be hierarchically organized; it must be a positive system and, finally, the information must be under full scrutiny by the registrar.

In the second general contribution, **Matti Ilmari Niemi** discusses the digitalization of transfer of immovable property rights. The topic of this second general contribution comes as no surprise given the extensive attention that has been given to the digitalization of immovable transfer and land registration, both in academia and in practice. In his discussion of electronic conveyancing, the author focuses on the English and the Finnish model. He specifically compares these two systems with the goal of offering one common law and one civil law example. First, the author remarks how the English plans for electronic conveyancing from the Land Registration Act 2002 have not yet been executed, whereas the new Finnish system is currently in use, for which he finds a possible explanation in the end of his contribution. Particular aspects of both systems aside,

it is interesting to mention some of **Niemi**'s general comparative remarks. First, the author considers electronic conveyancing to be the post-modern, contemporary step in an evolution that went from oral formalism and proceedings in pre-modern times to written formalism and proceedings in modern times. "The law always reflects the entire society – technology included." Second, as far as the land register is concerned, **Niemi** upholds that some registration systems are easier to unite with electronic conveyancing: thus, for instance, the register is best kept by one central authority, as is the case for both the English and Finnish land registers, but not for the German *Grundbuch* for example, which is kept in a decentralized way. Third, the author claims that electronic conveyancing is more compatible with transfer systems in which no separate conveyance is needed in addition to a first contract between parties (monist systems): "a simple conveyance can be transformed into a simple electronic process". As far as the optional or compulsory nature of electronic conveyancing is concerned, **Niemi** upholds that it is more ambitious but also more dangerous to install compulsory electronic conveyancing: after all, the system must function flawlessly, as soon as it is compulsory. This is probably a reason why the English compulsory electronic conveyancing has not yet been activated while the Finnish optional electronic conveyancing has. Finally, there is an important difference between the English system and the Finnish system that holds more general importance. In the English system, parties can exchange agreements in a network between themselves and the Registrar and that agreement is, as a final step, automatically put in the register. In the Finnish system, the parties submit their agreement online to the Registrar who receives it as a registration application: that Registrar is the only one capable of entering that agreement into the register. Other countries interested in electronic conveyancing will undoubtedly face (or are already facing) the same choice between these two options. The same is true for the other general remarks the author made: many of his insights are valid for other legal systems as well. After all, various other European states such as the Netherlands and Sweden are currently studying how to digitize their immovable transfer system. Both are looking into blockchain technology to do this, a topic about which much has been written in a previous issue of this review, amongst others. The interest in electronic conveyancing will doubtless grow in the future, given the ongoing digitalization of many aspects of our world. Thus, this contribution is, and will remain, very relevant.

After these introductory contributions, the attention shifts to the practical level by a discussion of the 15 case studies. Each of these highlights the practical functioning of the various systems in practice. The cases studied are the following: how to control the

property legal status of a person to an immovable?; which professionals are involved in the transfer process?; what is the form of a transfer agreement?; what is the effect of a valid transfer agreement?; what is the solution in the case of double sale?; what is the effect of an invalid transfer contract?; how is the acquisition of a house that is not yet constructed regulated?; what happens in case of hidden defects?; how is the responsibility for damages by an immovable regulated during the transfer process?; what if the sold house is leased to a third party?; how is the right to pass (an easement or servitude) regulated?; what is the effect of seizure of an immovable by the creditors of the seller, while the immovable is in the transfer process?; is it possible to gain an equitable proprietary interest in someone else's property?; what is the status of an immovable in the marital property regime?; and, finally, is adverse possession regulated? In addition to the national reports, every case study is accompanied by general and summarizing comparative remarks that enable the reader to relate every case to the larger legal framework and offers help in comparing the different systems.

All matters considered, the reviewed book constitutes a key tool for all comparative research on immovable transfer systems and land registration in Europe. It offers practical points of comparison along which the various European transfer and land registration systems may be ranked. Of course, the book is very practically oriented, apart from the two general contributions in the beginning, but as such it may be of great help to all those with an academic or practical interest in the field. Underlying theoretic nuances sometimes get a bit lost, but that is of course not the objective of this book, which can therefore not be blamed for it. From an academic point of view, this book forms the ideal starting point for all those wanting to conduct more theoretic comparative research in the field, because it is of course necessary to understand the practical issues of every immovable transfer system before elaborating on theoretic issues. This book will therefore undoubtedly be warmly welcomed by all researchers active in this field.